KANCHING REALTY SDN. BHD.

v.

LEONG KOK CHIN & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
EUSOFF CHIN J
[CIVIL APPEAL NO. R8-12-40 of 1989]
15 MARCH 1990

LAND LAW: *Housing developers - Liquidated damages under Housing Developers (Control and Licensing) Rules 1970.*

The appellant is a housing developer, and the respondents are the purchasers of one of the houses built by the appellant. It is not disputed that the date of completion and handing over of vacant possession of the house should be 1 April 1982.

The appellant said that the certificate of practical completion was issued by the architect on 10 September 1982 and alleged that this was the date for vacant possession.

The respondent said that he only took the keys to the house on 15 October 1983 and alleged that that is the date he took vacant possession of the house.

The Magistrate gave judgment for the plaintiff/respondent for liquidated damages for the period from 1 April 1982 to 15 October 1983.

There is a letter dated 11 November 1982 in the supplementary appeal record written by the appellant and addressed to the housing division of the treasury and copied to the respondent, wherein they stated, *inter alia*, that they were enclosing a copy of the architect's certificate verifying the completion of the above property and the delivery of vacant possession. They also asked for the payment of RM8,750 to themselves within 14 days from the date of their letter and the last payment of the same sum to their solicitors, also within 14 days. It was also stated in the same letter that the collection of keys to the property shall be arranged after the payment of the above two payments and any other progress payments remaining unpaid.

It is not denied that a copy of the appellant's letter was received by the respondent.

On 23 October 1983 the 1st respondent wrote to the appellant that he had only managed to collect the keys to this house from the site office on 15 October 1983 as the appellant's site office was always locked and unmanned.

The respondent claimed that he received the appellant's letter dated 11 October 1982 on 8 October 1983. This Court finds that difficult to believe. According to s. 12 of the Interpretation Act 1967, a letter posted is deemed to have been received in the ordinary course of the post. This Court thinks that the respondent ought to have received the said letter at the latest by 13 October 1982, but he only collected the keys to the house on 15 October 1983. The reason is that he could not get the keys because the appellant insisted on his paying all the balance of the purchase price including interest on late payments of instalments on the due date.

The respondent's Counsel argued that under clause 4 of the Third Schedule to the sale and purchase agreement, the keys to the house must be handed over first, before the balance sum of 5% of the purchase price was to be paid.

Held:

[1] The payments to the developers/solicitors and the handing over of the house keys to purchaser under clause 4 has to be done almost simultaneously.

[2] Since the appellants was willing and ready to give vacant possession of the house, but the respondent could not perform his part of the contract by tendering the balance of the purchase price, then the respondent cannot claim for liquidated damages under cl. 15 of the sale and purchase agreement for the period from 13 October 1982 (the date when he should have made final payment to the appellant) to the date he actually collected the keys, which is 15 October 1983.

[3] The date of delivery of vacant possession pursuant to the appellant's letter dated 11 October 1982 should be 13 October 1982. The appellant should have completed the house and be ready to deliver vacant possession of 1 April 1982. The appellant is therefore liable to pay liquidated damages to the respondent for the period of delay between 1 April 1982 to 13 October 1982.

[4] This Court therefore allows the appellant's appeal with costs.

[Appeal allowed with costs.]

Legislation referred to:
Housing Developers (Control and Licensing) Rules 1970, r. 12(1)(o), (1)(r)
Interpretation Act 1967, s. 12

For the applicant - Harpal Singh; M/s. A.J. Ariffin Chong & Harpal
For the respondent - Chan Chui Tin; M/s. A.K. Lee & Co.

JUDGMENT

Eusoff Chin J:

The appellant is a housing developer, and the two respondents (husband and wife) are the purchasers of one of the houses built by the appellant. It is not disputed that the date of completion and handing over of vacant possession of the house should be 1 April 1982.

The appellant said that the certificate of practical completion was issued by the architect on 10 September 1982, and his learned Counsel submitted that this was the date for vacant possession.

The plaintiff said he only took the keys to the house on 15 October 1983, and alleged that is the date he took vacant possession of the house.

The Magistrate gave judgment for the plaintiff for liquidated damages for the period 1 April 1982 to 15 October 1983.

Clause 19 of the sale and purchase agreement signed between the parties on 2 October 1980 states:

> Upon the issue by the developer's architect of a certificate certifying that the construction of the said building has been duly completed and provided the purchaser shall have paid all money payable under clause 3 hereof and all fees and charges for alterations and additional works authorised by him and shall have performed and observed the terms and covenants on his part to be performed and observed under this agreement the developer shall let the purchaser into possession of the said building and the said lot, provided that such possession shall not give the purchaser the right to occupy the said building and the said lot or to carry out alterations and additions thereon until such time as the certificate of fitness for occupation is

issued by the appropriate authority. Upon the expiry of fourteen (14) days from the date of a notice from the developer, requesting the purchaser to take possession of the said property the purchaser shall be deemed to have taken possession of the said property whether or not the purchaser has actually entered into occupation or possession of the property and the developer thereafter shall not be liable for any loss or damage to the said property and/or to the fixtures and fittings therein.

Rule 12(1)(o) and (r) of the Housing Developers (Control and Licensing) Rules 1970, [PU(A)268] applicable to the sale and purchase agreement between the parties states:

12.(1) Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely:

(o) provisions specifying the date of delivery of the vacant possession of the housing accommodation to the purchaser which date shall not be later than 18 months after the date of signing of the contract of sale;

(r) provisions binding on the licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than eight per centum per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale.

Enclosure 21 of the supplementary appeal record is a letter from the appellant addressed to the housing loan division of the Treasury and copied to the respondent, dated 11 October 1982, and stating as follows:

We are pleased to enclose herewith a photostat copy of the architect's certificate verifying the completion of the above property, and the delivery of vacant possession.

Your early payment of RM8,750 to us within fourteen (14) days from the date hereof is fully appreciated. At the same time, kindly make the last payment of RM8,750 to our present solicitors, A.J. Ariffin, Chong & Harpal of Suite 302, 3rd Floor, Kompleks Selangor, Jalan Sultan, Kuala Lumpur 01-26, as stakeholder within fourteen (14) days from the date hereof.

Collection of keys to the above property shall be arranged after the above two payments and any progress payments previously not paid.

It is not denied that a copy of appellant's letter was received by the respondent.

Obviously, a number of events must have occurred after this letter was written (which are not on record), and one year later, the 1st respondent wrote to the appellant on 23 October 1983 stating:

I have only managed to collect the keys of the above-mentioned house from your site office on 15 October 1983 as your site office is always locked without anyone manning the place.

With reference to your letter SP/KR/6/83/LKC dated 10 October 1983, I wish to draw your attention to your statement that quote "Kindly be corrected that method and working of interest payment have already been conveyed to the purchaser" unquote.

I went to see you on 5 October 1983 to discuss the collection of the keys of the house and nothing, I repeat nothing was discussed sic on the method and working of interest payment.

I have paid the interest under protest and I expect you to justify for the interest that you had charged me. Failing which you are answerable to repay me the whole amount with interest at current rate.

As for the house, any defects that I have already complained to your site office not rectified within 14 days I shall engage a contractor to repair the defects and bill you accordingly.

I think r. 12(1)(o) of PU(A)286 only requires the appellant to have the house completed and ready for delivery of vacant possession. It does not provide the terms subject to which vacant possession is to be handed to the purchasers.

Such terms are to be agreed upon between the appellant and the respondents in their sale and purchase agreement. Such terms are to be found in clause 19 of the sales and purchase agreement quoted above. The appellant is therefore obliged under clause 19 to hand over the keys and vacant possession of the house if, and only if the terms agreed upon are complied by the purchaser.

Nevertheless, for the protection only of the appellant from any liability for loss or damage to "the property and or to the fixtures and fittings therein", the respondent is deemed to have taken possession of the house 14 days from the date of the notice.

The respondent did not deny receiving the appellant's letter dated 11 October 1982, though he said he received it on 8 October 1983, which is almost a year later, and which without good reasons being given is difficult to believe. It is in law (s. 12 Interpretation Act 1967) provided that a letter is deemed to have been received in the ordinary course of the post. I think the letter ought to be received by the respondent at the latest by 13 October 1982, but he only collected the keys to the house on 15 October 1983. The reason is that he could not get the keys because the appellant insisted on his paying all the balance of the purchase price including interest on late payments of instalments on the due date. This is evident from the respondent's letter dated 23 October 1983 quoted above.

The respondent's learned Counsel argued that under cl. 4 Third Schedule to the agreement, keys to the house must be handed first before the balance of 5% of purchase price was to be paid. That clause 4 states:

> Upon delivery of possession of the said building to the purchaser pursuant to clause 15 and 19 hereof or upon the transfer of the said property to the purchaser pursuant to clause 21 hereof whichever shall first happen:
>
> (i) to be paid forthwith to the developer 5% of purchase price.
>
> (ii) to be paid to the developer's solicitors or some other person authorised by the Controllers as stakeholder for payment to the developer on production of the certificate of fitness for occupation issued by the appropriate authority in respect of the said building 5% of purchase price.

I think the meaning of this clause is clear. The payments to the developer/solicitors and the handing over of the house keys to purchaser under clause 4 has to be done almost simultaneously. This is so if one construes the words "upon delivery of possession ...".

This clause would operate this way:

The developer would tell the purchaser "Here are the keys to the house and give me the money", or the purchaser would tell the developer, "Here is the money, give me the house keys".

Under the circumstances, I am of the view that since the appellant was willing and ready to give vacant possession of the house, but the respondent could not perform his part of the contract by tendering the balance of the purchase price, then the respondent cannot claim for liquidated damages under clause 15 of the sales and purchase agreement for the period from 13 October 1982 (the date when he should have made final payment to the appellant) to the date he actually collected the keys, which is 15 October 1983.

The date of delivery of vacant possession pursuant to the appellant's letter dated 11 October 1982 should be 13 October 1982. The appellant should have completed the house and be ready to deliver vacant possession on 1 April 1982. The appellant is liable under clause 15 of the sales and purchase agreement to pay liquidated damages to the respondent for the period of delay between 1 April 1982 to 13 October 1982.

The Magistrate had allowed the respondent's claim under the said clause 15, to 15 October 1983.

I therefore allowed the appellant's appeal with costs.

I would add that if the respondent had been penalised with interests for delayed settlements of the progress payments to the appellant, his remedy is against the housing loan division for not making prompt payments in accordance with the schedule of payments to the sales and purchase agreement (Third Schedule).

Also found at [1990] 1 CLJ 1144